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No. ____

In the Supreme Court of the United States

ROBERT SHOWLER and JOHNNY DAVIDSON,
Individually and as Special Administrator of the
Estate of Kyle Adam Brinlee,
Petitioners,

v.

HARPER'S MAGAZINE FOUNDATION,
PETER TURNLEY, Individually and in his Capacity
as a Contributing Editor to Harper's Magazine,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a private citizen have a common law right to privacy with respect to funeral services and death images of a family member in accordance with *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004)?

2. Does a private citizen have the right to place restrictions upon the media in attendance at a funeral?

3. Is the funeral of a private citizen transformed into a "public" event based upon the location of the funeral and the number of persons in attendance, thereby eliminating all expectation of privacy?

4. Do the decisions of the United States District Court for the Eastern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit conflict with the decisions from this Court regarding the appropriate standards for granting summary judgment?

PARTIES TO THE PROCEEDING

Robert Showler
Johnny Davidson, Individually and as Special Administrator of the Estate of Kyle Adam Brinlee
Harper's Magazine Foundation
Peter Turnley, Individually and in his Capacity as a Contributing Editor to Harper's Magazine

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Petitioners, Robert Showler and Johnny Davidson, respectfully pray that a writ of certiorari issue to review the opinion and decision of the United States Court of Appeals for the Tenth Circuit issued on March 23, 2007.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not a published decision, but the Westlaw citation is available at 2007 WL 867188, 35 Media L. Rep. 1577 (10th Cir. 2007). The unpublished decision is included in the Appendix ("App.") hereto.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on March 23, 2007. Jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988) and 28 U.S.C. § 1332 (1996).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment, United States Constitution, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*,

410 U.S. 113, 152, 93 S.Ct. 705, 726 (1973). "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." *Id. See also Carey v. Population Services International*, 431 U.S. 678, 684-5, 97 S.Ct. 2010, 2016 (1977).

STATEMENT OF THE CASE

This Court, in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004), recognized that family members have a deeply rooted common law right to privacy in the control of the body and death images of their loved ones. This case involves a magazine photographer who took photographs of Plaintiffs' decedent in his open casket despite being specifically instructed not to do so. The District Court decided the First Amendment protected the unauthorized conduct and the 10th Circuit Court of Appeals held there was no right of privacy considering the public nature of the funeral. Both decisions were erroneous and this Court should grant certiorari to correct the lower courts' rejection of *Favish*.

A. Preliminary Statement

On December 30, 2005, the District Court for the Eastern District of Oklahoma granted summary judgment in favor of Harper's Magazine Foundation ("Harper's") and Peter Turnley ("Turnley") (jointly "Respondents") in a lawsuit filed by the surviving family of Sergeant Kyle Brinlee [Showler][1]

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[1] Kyle Brinlee was born as Kyle Showler on February 17, 1983. Kyle's name was changed to Brinlee in an adoption proceeding. In

("Kyle"). The Amended Complaint filed on June 14, 2005 asserted the following claims: Count I, Intentional Infliction of Emotional Distress; Count II, Invasion of Privacy; Count III, Violation of 21 O.S. § 839.1; Count IV, Fraudulent/False Misrepresentation; Count V, Constructive Fraud, Fraud and Deceit; Count VI, Unjust Enrichment; Count VII, Negligent Hiring, Retention, and Supervision. Plaintiffs appealed to the Tenth Circuit Court of Appeals on December 30, 2005. The Tenth Circuit affirmed the ruling of the United States District Court for the Eastern District of Oklahoma on March 23, 2007. (App. 3a).

B. Statement of the Facts

Sergeant[2] Kyle Adam Brinlee, 90th Troop Command, Oklahoma Army National Guard, was killed in action in Iraq on May 11, 2004, when an IED exploded near his vehicle. (App. 46a). Robert Showler, Kyle's biological father, and Johnny Davidson, Kyle's Grandfather and Personal Representative, hired Stephens Memorial Chapel in Pryor, Oklahoma, to coordinate the funeral and carry out the family's wishes so the family could grieve without being burdened by funeral arrangements. (App. 197a). On May 13, 2004, Showler, Davidson, and other family members met with Rick Stephens ("Stephens") of the Stephens Memorial Chapel to plan the funeral. (App. 197a). Showler and Davidson told Stephens that they did not want anyone taking pictures of Kyle's open casket, and that they did not want to

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the last few years of Kyle's life, Kyle often referred to himself as Kyle Showler.

[2] Kyle was promoted posthumously from Specialist to Sergeant.

be bothered by members of the media. (App. 197a). Stephens agreed to enforce these restrictions.

Peter Turnley was a photographer and contributing editor for *Harper's Magazine*. In this capacity, Turnley decided to prepare a pictorial essay of the impact the War on Terrorism was having on the families of soldiers and others killed-in-action. To do so, Turnley traveled to several funerals of soldiers around the country to take photographs. While attending a funeral in Texas, Turnley learned of Kyle's funeral and began making plans to attend. Turnley made at least three telephone calls to the Stephens Memorial Chapel to obtain permission to attend Kyle's funeral. (App. 197a). Turnley had already obtained photographs of other grieving families for the photographic essay Harper's planned to publish.[3] During one telephone call to Stephens, Turnley introduced himself to Mr. Stephens as Harper's photographer and requested permission to attend Kyle's funeral. (App. 24a, 133a). Mr. Stephens gave Turnley conditional permission to attend, provided Turnley complied with the three restrictions Stephens was placing on all members of the press who desired to attend. These restrictions were (1) Turnley was not to approach or contact the family during the funeral service, (2) Turnley was to remain in a section reserved for the press, and (3) Turnley could not take photographs of the open casket. (App. 24a, 133a-134a). Mr. Stephens testified that Turnley acknowledged and agreed to these restrictions. (App. 130a, 157a). Nevertheless, Turnley now denies that he was told not to photograph Kyle's open casket, (App. 130a) though he admits that he was given and agreed to abide by the other two restrictions. (App. 133a-134a). It goes without saying that no

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[3] This essay became *The Bereaved* and is the subject of this lawsuit.

other member of the press took open casket photographs of Kyle.

Kyle's funeral was held on May 19, 2004, at the Pryor High School Auditorium.[4] (App. 4a, 134a). Stephens spoke with Turnley again on the day of the funeral. (App. 134a). To control the media and carry out the family's wishes, Stephens designated an area for the press, including Turnley, at the back of the auditorium. (App. 133a-134a, 198a). Despite the restrictions imposed by Kyle's family, conveyed and agreed to by Turnley, Turnley took multiple photographs of Kyle in his open casket. (App. 134a-135a, 198a). Turnley even left the area prescribed by the family for the press and took photographs of Kyle's open casket from the sound and lighting control booth by sitting on a counter and leaning through the opening in the sound booth. (App. 133a,-134a, 198a). Finally, Turnley even introduced himself to Showler at the grave site despite his earlier agreement. (App. 134a). While speaking with Showler, Turnley offered to send Showler the photographs he had taken, but Turnley did not disclose to Showler that he had taken approximately ten photographs of Kyle's open casket. (App. 135a).

Harper's and Turnley published a photograph of Kyle's open casket in its August 2004 edition with the caption, "The casket of SPC. Brinlee at funeral services in a high school auditorium in Pryor, Oklahoma." (App. 135a). Though Respondents argue that the presence of Oklahoma's Governor in the photograph is significant to this case, there is nothing within the photograph or its caption that identifies Governor

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[4] Anticipating numerous family and friends at the funeral to mourn, Stephens obtained permission for the funeral to be in the Pryor High School auditorium.

Henry. (App. 135a). It is undisputed that Respondents never obtained permission to publish an open casket photograph of Kyle at any time, including for the August 2004 issue of *Harper's Magazine*. Turnley never told Showler that he intended to mail Showler numerous photographs of Kyle's open casket. (App. 135a). Showler first learned that Turnley had taken multiple open casket photographs when copies of the photographs arrived in the mail at his residence. (App. 5a). On August 7, 2004, Courtney Neal, Kyle's aunt, emailed Harper's and Turnley setting forth her vehement objections to the photograph of Kyle's open casket that they published. (App. 135a).

Despite knowing the objections that Kyle's family held concerning the open casket photographs and the publication of one of those photographs, Harper's and Turnley continued to promote their essay containing the open casket photograph by conducting numerous interviews with both local and international news agencies, appearing on multiple television programs, and entering the photograph in numerous competitions. (App. 132a). Respondents even had the audacity to sell the photographic essay with the photograph of Kyle's open casket to a French magazine, *Le Monde 2,* wherein it was subsequently published in France. Consequently, Mr. Showler, Mr. Davidson and Kyle's family have been damaged by Respondents' conduct.

REASONS FOR GRANTING THE PETITION

In *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004), this Court recognized that a private citizen has a common law right to privacy with respect to funeral services and death images of a family member. The United States Congress, the legislatures of several States, and the United States District Court for the

Northern District of Ohio have recognized this same common law right to privacy by enacting and upholding laws preventing picketing and/or protesting in the area surrounding funerals. However, the United States District Court for the Eastern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit improperly construed *Favish* to provide this right to privacy exclusively in cases arising from Freedom of Information Act requests, and concluded that *Favish* was inapplicable to Petitioners.

Private citizens have the right to place restrictions on the media attending a funeral. Indeed, restrictions on the media in this setting demonstrate the family's intent to reserve an expectation of privacy, not waive it. A funeral is not transformed into an unprotected "public event" based upon its location and the number of persons in attendance. Otherwise, undue constraints are placed on a grieving family.

The decision appealed is also in conflict with the decisions from this Court regarding the appropriate standards for granting summary judgment. The District Court improperly weighed the credibility of the evidence presented, improperly made findings of fact that were not supported by the record, improperly resolved disputed issues of fact in favor of the movant, and improperly considered the facts and inferences in a light most favorable to the movant. The Tenth Circuit improperly relied upon the District Court's findings of fact, improperly resolved disputed issues of fact in favor of the movant, and improperly considered the facts and inferences in a light most favorable to the movant. Finally, this Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254 (1988).

I. PRIVATE CITIZENS HAVE AN OVERARCHING RIGHT TO PRIVACY IN A FUNERAL SETTING.

This Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726 (1973). "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." *Id.* *See also Carey v. Population Services International*, 431 U.S. 678, 684-5, 97 S.Ct. 2010, 2016 (1977); *Aid for Women v. Foulston*, 441 F.3d 1101, 1116 (10th Cir. 2006) ("While the Constitution does not explicitly establish a right of privacy, the Supreme Court has recognized for nearly 100 years that a right of personal privacy does exist.") The United States Court of Appeals for the Tenth Circuit has held that:

> With respect to the question of when an individual has a legitimate expectation that information will remain confidential, we have held that an individual's expectation of privacy for constitutional purposes is legitimate only if the information is highly personal or intimate.

Livsey v. Salt Lake County, 275 F.3d 952, 956 (10th Cir. 2001).

The Tenth Circuit has recognized that there are two distinct types of information protected by the right of personal privacy:

> This right protects two kinds of privacy interests: the individual's interest in avoiding disclosure of personal

> matters and the interest in being independent when making certain kinds of personal decisions.... An individual is thus protected from disclosure of information where the individual has a legitimate expectation ... that it will remain confidential.

Aid for Women v. Foulston, 441 F.3d 1101, 1116 (10th Cir. 2006). *See also Hill v. National Collegiate Athletic Assoc.*, 7 Cal 4th 1, 35, 865 P.2d 633, 654 (1994). The Supreme Court of California in *Hill, supra.* held:

> A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity. Such norms create a threshold reasonable expectation of privacy in the data at issue.... Whether established social norms safeguard a particular type of information or protect a specific personal decision from public or private intervention is to be determined from the usual sources of positive law governing the right to privacy - common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative.... In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.... A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms.

Id. at 35-37, 654-655. Petitioners contend that they, along with all private citizens have a reasonable expectation of privacy regarding the funeral services and death images of loved ones.

An individual's right to privacy to control and restrict both the funeral and death images of a deceased family member is deep-seated in civilized society and is the fundamental principle upon which Petitioner's claims are based. This Court, in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004), recognized the common law right of privacy held by family members in controlling funerals and death images of their deceased loved ones:

> We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes. . . . Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rights and respect they seek to accord to the deceased person who was once their own. In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law. Indeed, this right to privacy has much deeper roots in the common law than the rap sheets held to be protected from disclosure in *Reporters Committee*. . . . We can assume Congress legislated against this background of law, scholarship, and history, when it enacted FOIA and when it amended Exemption 7(C) to extend its terms.

Favish, 541 U.S. at 167-69, 124 S.Ct. 1570, 1578-79 (2004). In the challenged decision, the Tenth Circuit concluded that *Favish* "is inapplicable" to Petitioners' privacy claims because

it relies on a statutory privacy right under the Freedom Of Information Act. (App. 10a). To the contrary, *Favish* explained that Congress' use of the term "personal privacy" in the FOIA was "intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions." *Favish*, 541 U.S. at 137, 124 S.Ct. 1570, 1578 (2004). The Tenth Circuit's analysis of *Favish* is too narrow. This Court did not suggest that the common law right to privacy as to a family's control over body and death images is limited to Freedom of Information Act requests. Furthermore, the Tenth Circuit's reasoning that *Favish* only protects "gruesome" death-scene photos and not images at a funeral is an overly restrictive interpretation. (App. 11a).

In fact, the United States District Court for the Northern District of Ohio recognized that the privacy rights set forth in *Favish* protect a family's right to privacy in holding a funeral. *Phelps-Roper v. Taft*, 2007 WL 915109, *5 (N.D. Ohio 2007). The Northern District of Ohio was called upon to determine the constitutionality of Ohio's statute regarding "Picketing or protesting during funeral services." OHIO REV. CODE ANN. § 367.30 (2006). In upholding Ohio's statute, the Court relied upon both *Favish* and a decision from the United States District Court for the Eastern District of Kentucky that upheld Kentucky's statute prohibiting picketing and protesting at funerals, which stated:

> A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an

> event memorializing the deceased, they must go to the place designated for the memorial event.

Phelps-Roper, supra., 2007 WL 915109 at *5 *citing McQueary v. Stumbo*, 453 F.Supp.2d 975, 992 (E.D. Ky. 2006). The *McQueary* court further held that:

> Thus, while a state cannot protect citizens from communications solely because the citizens may find the communications offensive, a state may protect citizens from unwelcome communications – including offensive communications – where the communications invade the privacy interests in an essentially intolerable manner, as where the communications are directed at citizens in their homes or where the communications are directed at a 'captive' audience and are so obtrusive that individuals cannot avoid exposure to them.

McQueary, supra., 453 F.Supp.2d at 989.

This Court has recognized that the family of a deceased person has a deeply rooted common law right to control the death images of their deceased loved one. *See Favish, supra.* A family's personal right to privacy regarding funerals and memorial services is now being recognized by the federal and states legislatures. To protect the privacy of family members charged with the painful task of burying a family member, including families of military personnel killed in action in Iraq and Afghanistan, the federal government and several states,[5]

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[5] In 2006, the United States Legislature passed the Respect for America's Fallen Heroes Act, which prohibits demonstrations at certain cemeteries. 38 U.S.C. § 2413 (2006). The following states

including Oklahoma, have enacted specific legislation to prevent picketing or protesting at funerals. The Oklahoma Statute states:

> (1) The Legislature finds that:
>
> (a) it is generally recognized that families have a substantial interest in organizing and attending funerals for deceased relatives...."

OKLA. STAT. tit. 21, § 1380(A)(1)(a) (2006). The Oklahoma Legislature further recognizes that one of the purposes behind enacting the Oklahoma Funeral Picketing Act is to "Protect the privacy of grieving families...."

Petitioners Robert Showler and Johnny Davidson had a "substantial interest" in honoring the life and service of their fallen son and grandson, and the privacy rights of Kyle's family should be recognized, protected and enforced. Petitioners' right to privacy is in no way diminished simply because large numbers of people, including the Governor of Oklahoma, chose to pay their respects at Kyle's funeral. If, as the Tenth Circuit and District Court have suggested, the number of attendees at a funeral alone will destroy a family's right to privacy, then no military family can expect any privacy with regards to the funeral or memorial services for its fallen soldiers, in part due to the number of military veterans attending the funerals of those killed in Afghanistan

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have enacted legislation to prohibit picketing/protesting at funerals: Arkansas, Colorado, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, South Dakota, Tennessee, Texas, Vermont, Virginia, Wisconsin and Wyoming.

and Iraq. Likewise, under the District Court and Tenth Circuit's rationale, a family with many friends, relatives and co-workers do not have an expectation of privacy simply due to the number of individuals who may wish to pay their final respects.

Petitioners had a reasonable expectation that Kyle's funeral service would remain private, despite the attendance of the media. Petitioners specifically placed restrictions upon and exercised control over the media in attendance to ensure the family's privacy would remain intact. Private citizens should not, as the Tenth Circuit suggests, have to post "signs limiting the photographers' permission" at funeral and memorial services in order to ensure that photographs of their deceased loved ones will not wind up in the media. (App. 19a). Any reasonable person would consider open casket photographs taken during a funeral service, without the permission of the family, to constitute an "unwarranted public exploitation" of privacy. Petitioners' right to privacy was first violated when Turnley photographed Kyle's open casket, against the explicit instructions of the Petitioners. Turnley and Harper's further invaded Petitioners' privacy by publishing the open casket photograph of Kyle. Petitioners simply request that such invasions of their privacy be recognized and enforced. Therefore, this Court should grant certiorari to instruct lower courts on the existence of a common law right to privacy, as recognized in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004).

II. PRIVATE CITIZENS HAVE THE RIGHT TO CONTROL THE FUNERAL OR MEMORIAL SERVICES OF FAMILY MEMBERS.

Oklahoma has recognized the right and duty of family members to direct and control disposition of the body of the

deceased in Oklahoma Statute title 21, § 1158 (1997) and *Brady v. Criswell Funeral Home, Inc.*, 916 P.2d 269 (Okla. Civ. App. 1996). In *Brady*, the Court of Appeals reviewed whether a funeral home could be negligent in proceeding with the cremation of a deceased person over the objection of one of the family members. The funeral home's knowledge of a disagreement between the children of the deceased precluded awarding the funeral home summary judgment, because:

> Such knowledge of disagreement between next of kin with equal authority to dispose of the bodily remains overrides Appellant's brother's representation that he had the authority to determine the disposition of the body. Sufficient facts exist creating at least a question of fact as to whether Appellee funeral home did what it reasonably should have done.

Id. at 271. *Brady* recognized that each family member had the right to control the disposition of the deceased's body, and the funeral home had a duty to respect the same.

Petitioners had a duty pursuant to OKLA. STAT. tit. 21, § 1158 (1997) to bury Kyle and had an absolute right to control every aspect of Kyle's funeral. Petitioners exercised their rights to control Kyle's funeral service by allowing the media to attend under limited circumstances. Petitioners specifically instructed Stephens that the media was not to approach the family, the media must be restricted to a specific area during the funeral service, and Petitioners demanded that Stephens prohibit the media from taking photographs of Kyle's open casket. Stephens testified that, as an agent of Petitioners, he notified Turnley of Petitioners' restrictions, in particular the restraint on photographing Kyle's open casket. Therefore, this Court should grant certiorari to instruct lower courts on the existence of a common law right to privacy, as

recognized in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004).

III. THE FUNERAL OR MEMORIAL SERVICE OF A PRIVATE CITIZEN IS NOT A "PUBLIC" EVENT.

The District Court and the Tenth Circuit held that Petitioners had no right to privacy in Kyle's funeral as the service was a public event, due to the number of attendees, the location of the funeral, and the fact that the funeral arrangements were published in a local newspaper prior to the service. Since the Petitioners "opened up the funeral scene to the public eye," the Court reasoned, they "can not, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo." (App. 15a). Petitioners agree there was local public interest in honoring Kyle, but the number of people who were permitted to attend the funeral did not eliminate their reasonable expectation of privacy as to photographic images of the open casket.

The Tenth Circuit opinion wrongly concludes that Petitioners could not place reasonable restrictions on photography to preserve their right of privacy since the funeral was "open to the public eye." Neither was the high school gymnasium a public forum that would eliminate all privacy interests. The number of people present is not relevant in a determination of whether a property is a public forum. For example, this Court has recognized three categories of fora in analyzing the degree of scrutiny applicable to uphold governmental regulation of free speech. The public versus non-public forum distinction is instructional in this case, since the 10th Circuit has emphasized that Kyle's funeral was held in a public high school auditorium.

A traditional public forum has been defined as "property that has as a principal purpose the free exchange of ideas." (Citations omitted). *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679, 112 S.Ct. 2701, 2706 (1992). This Court has repeatedly held that a public forum is not:

> ... created whenever members of the public are permitted to freely visit a place owned or operated by the Government. The decision n [sic] to create a public forum must instead be made by intentionally opening a nontraditional forum for public discourse. (Citations omitted).

Id. at 680, 2706. A public forum is traditionally a locale that: "... qualifies for the description of having immemorially ... time out of mind been held in the public trust and used for purposes of expressive conduct." *Id. See also Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 1641 (1998) ("Traditional public fora are defined by the objective characteristics of the property, such as whether, by long tradition or government fiat, the property has been devoted to assembly and debate." (Citations omitted)). This Court in *Forbes* further held that:

> Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all.

Id. at 678, 1641.

In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948 (1983), this Court analyzed the public versus non-public forum with regards to access to

public school teachers by competing unions. This Court stated:

> But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. Nowhere have we suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for unlimited expressive purposes. (Citations omitted).

Id. at 44, 954. In determining that the public school teachers' mailboxes were not a public forum, this Court further declared:

> We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum.

Id. at 47, 956.

The Missouri Court of Appeals examined whether a couple's attendance at a hospital function, in which the couple received unwanted publicity, waived their right to privacy. *Y.G. and L.B. v. Jewish Hospital of St. Louis*, 795 S.W.2d 488 (Mo. Ct. App. 1990). The Court held that:

> The mere fact that an event takes place where others are present does not waive the right to privacy... Similarly, disclosing private facts to an individual, even a member of the press, is not consent to publication since a selective disclosure is based on a

> judgment as to whether knowledge by that person would be felt to be objectionable. (Citations omitted).

Id. at 502. Similar to the Petitioners in the present case, the Missouri Court of Appeals determined that the plaintiffs took steps to ensure their participation in the *in vitro* fertilization program would remain private, as plaintiffs: "... were assured that no publicity nor public exposure would occur, that they twice refused interviews or to be filmed, and made every reasonable effort to avoid being filmed..." *Id.* at 501. The Missouri Court of Appeals further stated: "In addition, we cannot hold that attendance at the gathering constituted an appearance in a public place so as to subject appellants to publicity." *Id.* at 502.

Petitioners obtained permission to use the Pryor High School Auditorium and exercised control over the building. Petitioners contend that Kyle's funeral was not a public event and was not held in a public forum. Petitioners suggest that for the purposes of Kyle's funeral, the Pryor High School Auditorium was not a forum at all. *Forbes*, 523 U.S. at 678, 118 S.Ct. at 1641. A funeral is not an environment which has traditionally been open for public debate. Following the reasoning in *Perry, supra.*, the Pryor High School Auditorium did not constitute a public forum, unless the high school opened it "... for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45, 103 S.Ct. at 955. Kyle's funeral was not "a place for expressive activity" but rather the only venue in Pryor, Oklahoma which would accommodate all of Kyle's family and friends, military veterans, and other mourners. The simple fact that Kyle's funeral was open to all those who wished to pay their respects to Kyle and his family similarly did not convert the funeral into a public event. *See International Society for Krishna Consciousness, Inc. v. Lee, supra.* To hold otherwise would subject all individuals who

publish an obituary containing information regarding services for the deceased with a large number of family and friends who wish to attend the funeral of a loved one subject to unreasonable publicity by the media. As set forth fully in Section I above, Kyle's funeral was a private event in which Petitioners had a reasonable expectation of privacy.

Similar to the plaintiffs in *Jewish Hospital, supra.*, Petitioners took every reasonable step to ensure their privacy would be protected during Kyle's funeral service. Petitioners had the right to believe that the media would abide by the family's wishes in exchange for the family's permission to attend Kyle's funeral. It is undisputed that Petitioners directed Stephens to: restrict the media to a designated area during Kyle's funeral, instruct the media not to approach Petitioners or other family members, and instruct the media not to take pictures of Kyle's open casket. (App. 133a). It is unreasonable to suggest that Petitioners were somehow required to post notices at a funeral service that photographs should not be taken. Traditionally, funerals and memorial services are not gatherings in which fear of publicity stands at the forefront of a family's mind, because such actions would clearly offend the reasonable sensibilities of rational persons mourning the dead. Petitioners' actions in placing restrictions upon the media in attendance should have been sufficient to guarantee the family's privacy, but for Turnley's wrongful actions. This Court should therefore grant certiorari to distinguish the characteristics of what constitutes a public event or forum in relation to the funerals of private individuals.

IV. THE DECISIONS OF THE LOWER COURTS CONFLICT WITH THE DECISIONS FROM THIS COURT REGARDING THE APPROPRIATE STANDARDS FOR GRANTING SUMMARY JUDGMENT.

Appellate courts review *de novo* a district court's grant of summary judgment. *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1139 (10th Cir. 2004). This Court recognized the standard for summary judgment in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986):

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This Court also noted that the non-moving party need not present evidence that would be admissible at trial to avoid summary judgment. *Id.* at 324, 2553. Appellate courts:

> ...must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. Where different ultimate issues may be drawn, the case is not one for summary judgment.

Norton v. City of Marietta, 432 F.3d 1145, 1152 (10th Cir. 2005). *See also James v. Atchison, Topeka & Santa Fe Ry. Co.*, 464 F.2d 173, 175 (10th Cir. 1972):

> ... the courts, trial and appellate, must consider factual inferences tending to show triable issues in a light favorable to the existence of such issues. (Citations omitted). Thus, if there is an inference which can be deduced from the facts whereby decedent might recover, summary judgment is inappropriate.

For a non-moving party to overcome summary judgment, this Court has consistently determined that:

> ...summary judgment... will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.... it is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510 (1986). This Court further held in *Anderson* that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the

> non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 255, 2513.

Federal courts have repeatedly held that: "Disputed issues of fact must be resolved in favor of the non-moving party, and reasonable inferences should be drawn in its favor as well." *Local Union 7107 v. Clinchfield Coal Co.*, 124 F.3d 639, 640 (4th Cir. 1997). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-588, 106 S.Ct. 1348, 1356-1357 (1986); *Abdullahi v. City of Madison*, 423 F.3d 763, 769 (7th Cir. 2005). "On a motion for summary judgment, disputed issues of fact are resolved against the moving party..." *General Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 517 (1997).

Pursuant to this Court's decisions, the District Court and the Tenth Circuit were required to resolve all disputed issues of fact in favor of Petitioners, and the lower courts' failure to apply the proper standards in ruling on Respondents' Motion for Summary Judgment constitutes reversible error.

A. Petitioners Presented Sufficient Evidence to Overcome Summary Judgment on their Claims for Invasion of Privacy

Petitioners had a reasonable expectation of privacy at Kyle's funeral and presented sufficient evidence that Respondents violated their right to privacy by taking and publishing the photograph of Kyle's open casket without the family's permission. Although the media was allowed to attend Kyle's funeral, Petitioners took reasonable steps to prevent invasions of their privacy by placing limitations upon the media, including: (1) restricting the media to an isolated

area at the rear of the auditorium, in order to limit and restrict the filming/photographing of the service only from that area; (2) prohibiting media contact with the family during the service; and (3) prohibiting the media from taking pictures of Kyle's open casket. (App. 130a and 134a). Stephens testified that he gave these instructions to Turnley and that Turnley agreed to abide by these instructions. (App. 130a).

Petitioners contend that Turnley clearly recognized that Kyle's family had the right to prohibit or restrict the media's attendance at Kyle's funeral. Indeed, he made several telephone calls to Stephens Memorial Chapel requesting permission to attend the service. (App. 133a, 197a). Turnley requested to speak to Kyle's family directly, but was informed that the family did not want to be contacted by the media. (App. 67a). Stephens testified that he spoke to Turnley on two (2) separate occasions, and each time, Turnley agreed to abide by all three (3) of Petitioners' restrictions placed upon the media. (App. 130a, 133a and 134a).

The reasonable person standard asks whether a reasonable person would be offended by the alleged invasion of privacy. Although a stranger might not be offended by the photograph of Kyle in *The Bereaved*, any reasonable person would be offended, indeed outraged, if a picture of their family member lying in an open casket was taken during a funeral or memorial service and subsequently published around the Globe without the permission of the family. Petitioners testified that they were shocked and highly offended by both the multiple pictures of Kyle in his open casket that were sent to Showler and by the publication of the open casket photograph in *The Bereaved*. (App. 131a). It is no surprise that Petitioners suffered severe emotional distress from Respondents wrongful conduct. (App. 49a).

B. Petitioners Presented Sufficient Evidence to Overcome Summary Judgment on their Claims for Fraudulent/False Misrepresentation, Constructive Fraud, Fraud and Deceit

Petitioners presented sufficient circumstantial evidence of Turnley's fraudulent misrepresentations to warrant the submission of this issue to a jury. Additionally, the conflicting testimony regarding whether, in fact, Turnley agreed not to photograph Kyle's open casket is a question that should be resolved by a jury. Oklahoma Courts have set forth the requirements to establish a claim for fraudulent/false misrepresentation as follows:

> To recover under the theory of fraudulent misrepresentation, or deceit, a plaintiff must prove (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant made the representation knowing it was false or in reckless disregard of the truth; (4) that the defendant made it with the intention that it should be acted upon *by the plaintiff*; (5) that *plaintiff* acted in reliance upon it; and (6) that plaintiff thereby suffered injury.

Sturgeon v. Retherford Publ'ns, Inc., 987 P.2d 1218, 1228 (Okla. Civ. App. 1999), *citing Ramsey v. Fowler*, 308 P.2d 654 (Okla. 1957). The Oklahoma Supreme Court has recognized that fraud may be proved by circumstantial evidence:

> It is asserted there was circumstantial evidence introduced to establish the ultimate facts of fraud and misrepresentation of defendants that in a total failure to instruct on the value and use of circumstantial evidence the plaintiffs were denied a fair trial.... (9)

> Circumstantial evidence of fraud is admissible in evidence as same relates to the whole transaction between the parties; (10) fraud may be proved by direct or circumstantial evidence, or both; (11) circumstances tending to prove fraud may be admitted into evidence to show the entire transaction between the parties.

Chase v. Watson, 294 P.2d 801, 805 (Okla. 1956). Other jurisdictions have similarly held that circumstantial evidence is sufficient to establish a cause of action for fraud:

> Fraud may be established by circumstantial evidence; however, it may not be presumed, and a party's case will fail if he can show only facts and circumstances which are equally consistent with honesty and good faith. (Citations omitted).... Furthermore, we must resolve direct factual conflicts in favor of Craft, assume as true all facts in her favor which the evidence tends to prove, and give her the benefit of all reasonable inferences.

Craft v. Metromedia, Inc., 766 F.2d 1205, 1218 (8th Cir. 1985).

> It is not essential that direct evidence of fraud be adduced; circumstantial evidence may be sufficient to establish it, and fraud may be proved by evidence wholly circumstantial, or by a combination of direct and circumstantial evidence, and, where in the face of inferences so strong as to make out a prima facie case of fraud defendant remains silent, plaintiff should recover. Where fraud is to be shown by circumstantial evidence, such evidence should be considered in its entirety without giving undue importance to isolated

> facts; although each circumstance alone may be trivial and unconvincing, the combination of all the circumstances considered together may furnish irrefragable and convincing proof of fraud. However, the facts and circumstances proved must clearly establish the inference of fraud.

Jones v. Seal, 409 S.W.2d 382, 385 (Tenn. App. 1966) *citing* 37 C.J.S. Fraud § 115.

Some jurisdictions have also determined that intent may also be proved by circumstantial evidence.

> Fraudulent intent not to perform a promise cannot be inferred merely from the fact of nonperformance. However, evidence of fraud is rarely susceptible of direct proof and must ordinarily be established by circumstantial evidence and the legitimate inferences arising therefrom.... fraudulent intent can be inferred from the additional evidence available. The nature and extent of the party's prior course of dealings, the defendants' knowledge of BPI's financial insecurity, and Kohl's subsequent denial of a promise he was alleged to have made, taken together with all of the evidence, could permit an inference by the fact finders of fraudulent intent. In short, material issues of fact exist with respect to the issue of defendants' intent.

Goshen Litho, Inc. v. Kohls, 582 F.Supp. 1561, 1564 (S.D.N.Y. 1983).

> Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. (Citations omitted). And this choice in turn may be influenced by the fact finder's views on credibility.

> Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.... although circumstantial evidence may be used to establish any material fact, 'it must transcend mere suspicion.' Reasoning from circumstantial evidence often involves linking apparently insignificant and unrelated events to establish a pattern. A court, therefore, must not view each piece in isolation, but in view of all known circumstances. Nevertheless, 'legally sufficient circumstantial evidence requires a logical bridge between the proffered evidence and the necessary fact.' (Citations omitted)... The mere failure to perform a contract is no evidence of fraud. Denial of having made a promise is also a factor showing no intent to perform when the promise was made.

Beal Bank v. Schleider, 124 S.W. 3d 640, 648-649 (Tex. App. 2003).

Stephens testified that he obtained Turnley's agreement on two separate occasions to abide by Petitioners' three restrictions upon the media. (App. 130a and 134a). Turnley has admitted to giving his promise to abide by two of the restrictions, but not the one about photographs of the open casket. This is a material dispute of fact. (App. 130a). The District Court and the Tenth Circuit were required for the purposes of summary judgment to resolve this dispute in Petitioners' favor, and assume that Turnley did, in fact, agree to not take pictures of Kyle's open casket.

Circumstantial evidence exists to support a finding that Turnley's agreement to abide by Petitioners' restrictions was fraudulent. Turnley made multiple telephone calls to Stephens

Memorial Chapel seeking permission to attend Kyle's funeral. (App. 4a). It is unlikely Turnley would have sought permission except that he believed the family had a right to exclude him. When speaking with Stephens, Turnley admitted that he was informed of Petitioners' restrictions that were placed upon the media allowed to attend Kyle's funeral, and Turnley agreed to such restrictions.[6] Stephens testified that he was prepared to exclude certain specific individuals, including members of the media who refused to abide by the Petitioners limitations. (App.131a).

Clearly, Turnley failed to remain in the area of the auditorium reserved for the press. (App. 134a). Turnley failed to abide by his agreement not to approach Kyle's family at the service. (App. 134a). Turnley's subsequent denial of his agreement to not take pictures of Kyle's open casket combined with his failure to follow the restrictions to which he admittedly agreed is circumstantial evidence of a fraudulent intent when he made his agreement. Petitioners relied on Turnley's agreements to abide by the media limitations when Turnley was granted permission to attend the funeral.

If all of the testimony and evidence presented by Petitioners is taken as true, Petitioners, as a matter of law, have established sufficient circumstantial evidence of Turnley's fraudulent conduct to present their case to a jury. Therefore, the District Court's entry of summary judgment against Petitioners was improper, and the decision of the Tenth Circuit in affirming the District Court's decision constitutes reversible error for failure to apply the appropriate

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[6] Although Turnley's agreement to refrain from taking pictures of Kyle's open casket is in dispute, the lower courts were required to resolve this factual dispute in favor of Petitioners.

standards for summary judgment set forth by this Court. This Court should therefore grant certiorari to reiterate the standards to be applied by district courts regarding summary judgment.

CONCLUSION

The Court should grant certiorari because the Tenth Circuit Court of Appeals has decided an important question of federal law in a way that conflicts with this Court's decision in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004). The United States Congress, the legislatures of several states, and the United States District Court for the Northern District of Ohio have followed this Court's recognition in *Favish* that family members have a deeply rooted common law right to privacy in the control of the body and death images of their loved ones. The Tenth Circuit's narrow interpretation of *Favish*, as recognizing only the statutory right to privacy contained within the Freedom of Information Act, can only harm a private citizen's common law right to privacy.

The Tenth Circuit improperly discounted Petitioners' right to place restrictions upon the media when it determined that Kyle's funeral was a public event. The Tenth Circuit incorrectly applied the elements necessary to establish a cause of action for fraud, by disregarding the circumstantial evidence supporting Petitioners' cause of action. In direct contravention to this Court's prior decisions, the Tenth Circuit improperly relied upon the District Court's findings of fact, improperly resolved disputed issues of fact in favor of the movant, and improperly considered the facts and inferences in a light most favorable to the movant.

Respectfully submitted,

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